No. 78-437

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CINDY WESTCOTT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANT

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OPINION BELOW

The opinion of the district court (J.S. App. 1A-37A) is not yet reported.

JURISDICTION

The order of the district court declaring unconstitutional and enjoining appellant from enforcing part of 42 U.S.C. 607 was entered on April 20, 1978

(J.S. App. 39A-42A). A notice of appeal to this Court was filed on May 17, 1978 (J.S. App. 43A-44A). On July 7, 1978, Mr. Justice Brennan extended the time for docketing the appeal to and including August 15, 1978, and on August 7, 1978, he further extended the time to and including September 14, 1978. The appeal was docketed on that date, and this Court noted probable jurisdiction on December 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975).

QUESTION PRESENTED

Whether Section 407 of the Social Security Act, which provides benefits to two-parent families in which a dependent child has been deprived of parental support because of the unemployment of his father but does not provide benefits when the mother becomes unemployed, violates the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

Section 407 of the Social Security Act, 42 U.S.C. 607, is set forth in the Appendix to this brief.

STATEMENT

1. The Aid to Families with Dependent Children program, 42 U.S.C. 601 *et seq.*, provides financial assistance to families with needy dependent children. If a state elects to participate in the program, it must comply with the requirements set forth in 42 U.S.C. 602(a) and the applicable federal regulations, and its plan must be approved by the Secretary of Health, Education, and Welfare in order for the state to qualify for federal reimbursement for a percentage of its expenditures. 42 U.S.C. 602-603. If a state that participates in the AFDC program also participates in the Medicaid program, persons who receive AFDC benefits are entitled to receive Medicaid benefits. 42 U.S.C. 1396a(a)(10).

AFDC benefits are intended to assist needy "dependent" children. The program originally was limited to children who were needy and had been deprived of the support of one parent because of that parent's death, absence, or incapacity. *Batterton* v. *Francis*, 432 U.S. 416, 418 (1977). The Act now also provides assistance to certain families where both parents are present and neither is disabled. Section 407(a) of the Act, 42 U.S.C. 607(a), defines the term "dependent child" to include a "needy child * * * who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father * * *." This portion of the program is known as Aid to Families with De-

pendent Children, Unemployed Father (AFDC-UF). Although every state participates in the AFDC program, only 26 states (and the District of Columbia) participate in the AFDC-UF program.[1] Massachusetts participates in the AFDC-UF program. 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01, 303.04.[2]

2. In November 1976 appellees Cindy and William Westcott, who have one son, applied to the Massachusetts Department of Public Welfare for public assistance (A. 39). The Westcotts were informed that they did not qualify for AFDC-UF benefits because William, who was unable to find work, had not previously been employed for a sufficient period to qualify as an "unemployed" father under 6 CHSR III, Subch. A, Pt. 303, Subpt. A, § 303.04 (A. 39). In February 1977 appellees Susan and John Westwood, who have one son, applied for Medicaid benefits (A. 39).[3] The Westwoods' application also was

[1] See Assistance Payments Administration, Social Security Administration, Department of Health, Education, and Welfare, Characteristics of State Plans for Aid to Families With Dependent Children Under the Social Security Act Title IV (1976 ed.).

[2] Although Massachusetts statutes define a "dependent child" for purposes of the AFDC program to include "a needy child who has been deprived of parental support or care by reason of * * * the unemployment of a parent," Mass. Ann. Laws ch. 118, § 1 (Law. Co-op 1975), its regulations limit this aid to families where the father is unemployed. 6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, § 303.01.

[3] Pursuant to 42 C.F.R. 448.1(a)(1) and (c), a state may elect to provide Medicaid coverage to families that are eligible for AFDC benefits, but who have not applied for cash assistance. Massachusetts provides coverage for such families. Mass. Public Assistance Policy Manual, Ch. I, § F, Subd. 2a.

denied because the father's work history was insufficient (A. 39-40).

3. Appellees then instituted this class action in the United States District Court for the District of Massachusetts, naming as defendants the Secretary of Health, Education, and Welfare and the Commissioner of the Massachusetts Department of Public Welfare (A. 8-20). Appellees contended that Section 407 of the Social Security Act and the implementing state regulations discriminate on the basis of gender in violation of the Fifth and Fourteenth Amendments to the United States Constitution. They sought declaratory and injunctive relief against continued enforcement of Section 407 and the state regulations.

The Commissioner stipulated that the Department of Public Welfare would reconsider appellees' eligibility (A. 28, 37); it concluded that the Westcotts and the Westwoods satisfied all the requirements of eligibility for AFDC-UF benefits except for the requirement that the "unemployed" parent be the father (A. 39, 40). The mother in each family is unemployed and each mother has a work history sufficient to meet the federal and state tests of eligibility that are applied when fathers are unable to find work (*ibid.*).[4]

[4] The Commissioner and appellees stipulated that appellees would receive during this litigation the benefits they had requested, provided that they continued to meet the eligibility requirements (with the exception of the requirement that the unemployed parent be the father) (A. 28, 37).

The district court certified the case as a class action under Fed. R. Civ. P. 23(b), defining the class as all Massachusetts families who would be eligible for AFDC-UF (and therefore Medicaid) benefits but for the requirement in Section 407 that the unemployed parent be the father (J.S. App. 11A-19A).[5]

The court concluded that appellees had established that Section 407 violates the Due Process Clause. It stated that *Craig* v. *Boren*, 429 U.S. 190, 197 (1976), and *Califano* v. *Webster*, 430 U.S. 313 (1977), establish that gender-based distinctions are unconstitutional unless they " 'serve important governmental objectives and [are] substantially related to achievement of those objectives' " (J.S. App. 21A-22A). The court concluded that the governmental objectives of the AFDC and AFDC-UF programs are "the protection and care of needy children in families without a breadwinner's support and the maintenance of family structure and stability" (*id.* at 23A). These objectives, the court held (*id.* at 26A-28A), are not served by the gender distinction in Section 407, which denies assistance to needy children in families where the mother, who had been the breadwinner, becomes unemployed; in such cases, the court reasoned, the AFDC program encourages fathers to desert so their families can qualify for benefits (*id.* at 27A-28A). The court also stated (*id.* at 29A-30A) that the gender distinction in Section 407 "appears to rest on an 'archaic and overbroad generalization,'

[5] We do not contest the class certification.

Schlesinger v. *Ballard*, [419 U.S. 498], 508, about the role of women in society." Although the court acknowledged that the generalization that men are likely to be the primary supporters of their families is not without some empirical support, it found the generalization "clearly archaic and overbroad" (*id.* at 30A-31A).

Finally, the court concluded that the proper remedy is the extension of the AFDC-UF program to all families with needy dependent children where either parent is unemployed within the meaning of the Act and implementing regulations (*id.* at 34A-37A).[6]

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 407 unquestionably entails a distinction on the basis of gender. A family in which the father (but not the mother) is "unemployed"[7] is eligible for benefits if it otherwise satisfies applicable need tests; a family in which the mother (but not the father) is unemployed is not eligible, even though it may be as needy as the first family.

But in one fundamental respect this case differs from any previous case in which this Court has con-

[6] The district court entered a temporary partial stay of its order but denied a full stay pending appeal. On January 8, 1979, this Court stayed the district court's order pending disposition of the case.

[7] We use "unemployed" as a term of art, designating a person who not only is out of work but also meets the duration-of-employment and other criteria of Section 407 and the Secretary's regulations. See 45 C.F.R. 233.100.

sidered gender distinctions: although the statute calls for a gender-based distinction, the result of applying the statute is not gender-biased. The AFDC-UF program assists two-parent "families" with dependent children. The gender distinction contained in Section 407 does not come into play unless both parents are present in the family. The statute provides for a grant of aid, triggered by the father's unemployment, that benefits the entire family—which necessarily includes a father, a mother, and one or more children. In every case the grant or denial of aid to the entire family affects, to an equal degree, one man, one woman, and children of both sexes. This sex-neutral outcome is the backdrop against which the gender distinction in Section 407 must be evaluated.

A

Section 407 was intended to correct a flaw in the AFDC program, namely the program's tendency to induce unemployed fathers to desert so that their wives and children could become eligible for AFDC benefits.

Since its inception, the AFDC program has been designed to assist children who are needy because one parent is absent, dead, or incapacitated. Congress has not used the program to assist children whose parents are present in the home and able-bodied, but unable to find employment. Congress took a tentative step toward broadening the role of the AFDC program in 1961 by enacting a temporary program for children of unemployed parents. Evidence presented to Congress in 1961 revealed not only a short term problem caused by a recession but also the more fundamental problem that the AFDC program itself encouraged unemployed fathers to desert their families so that they would qualify for benefits. There was no evidence of desertion by a significant number of mothers.

When in 1967 Congress adopted Section 407 as permanent legislation, it elected not to reorient the AFDC program to provide aid for all children who were needy. Instead, the legislative history reveals that Congress determined to create a narrow adjunct to the AFDC program designed to offset the incentive for certain recently unemployed fathers to desert their families in order to enable them to receive AFDC benefits. Consistent with the limited aim of removing the incentive for unemployed fathers to desert, Congress deliberately changed the term "parent," which had been used in the earlier temporary enactment, to "father."

B

This Court has articulated a variety of standards in gender distinction cases. The opinion of the Court in *Craig* v. *Brown*, 429 U.S. 190, 197 (1976), identifies an intermediate standard of review: "[t]o withstand constitutional challenge, * * * classifications by gender must serve important government objectives and must be substantially related to achievement of those objectives." Yet other opinions in *Craig* stated that the Court had not established a new standard of review for gender discrimination cases and emphasized

the importance of factors such as whether a particular classification is based on a considered legislative judgment or merely results from reliance on a stereotype. See *id.* at 210 n.* (Powell, J., concurring), *id.* at 211-214 (Stevens, J., concurring). And Mr. Justice Rehnquist argued that same Term, in an opinion joined by three other Justices, that the standard of review in gender-distinction cases should depend on the nature of the statute in question; social welfare legislation, he contended, should be upheld when it embodies a reasonable empirical judgment consistent with the legislative design. *Califano* v. *Goldfarb*, 430 U.S. 199, 224-242 (1977) (Rehnqiust, J., dissenting).

Section 407 is constitutional under any of these approaches. The gender distinction in Section 407 does not rely on or perpetuate overbroad and outmoded stereotypes about the roles of the sexes. It reflects, instead, Congress' considered decision to rectify the AFDC program's tendency to encourage unemployed fathers to desert their families so that the latter could receive AFDC benefits. Congress wanted to deal with this problem without adopting a general program of welfare for all needy children or for all unemployed parents. The means Congress selected did not discriminate in favor of or against either sex. AFDC benefits are not based on contributions to a fund, they are not payments for work performed by either parent, and they are not unemployment compensation. Accordingly, Section 407 does not result

in female employees receiving less compensation than male employees, and it does not diminish the value of taxes or contributions paid by mothers.

ARGUMENT

Whether a statute violates the Due Process Clause of the Fifth Amendment depends both on the meaning and purpose of the statute and on the standards of rationality that a statute must meet to be sustained. In this case the statute is part of a social welfare program, and it is unusual because, although it draws distinctions based on sex, it does not discriminate for or against women. We therefore first take up the background and purpose of the statute and then turn, at pages 24-40, *infra*, to the appropriate standards of constitutional analysis and their application to a gender-based statute that does not produce gender-biased results.

A. CONGRESS ENACTED SECTION 407 TO REDUCE THE INCENTIVE FOR UNEMPLOYED FATHERS TO DESERT THEIR FAMILIES IN ORDER TO MAKE THEM ELIGIBLE FOR FEDERAL AID

The AFDC program was enacted in the wake of the Depression to meet the needs of children who would not be aided by work relief programs—children deprived of parental support because of the absence, death, or incapacity of one parent. S. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935). Congress assumed that work relief programs and the revival of private industry would meet the needs of children whose

parents were present in the home and able-bodied, but unable to find employment.[8] The AFDC program retained this focus until the 1960s, when Congress enacted Section 407 and its temporary precursor.

The adoption of Section 407 did not signal a legislative decision to use AFDC funds to alleviate the loss of income caused by unemployment in general. Indeed, Section 407 provides no benefits for children who presumably suffer the most serious deprivation because of unemployment, *i.e.*, children whose parents have no significant work experience or who have been unemployed for an extended period of time. Section 407 extended benefits only to needy children in families whose unemployed fathers had a substantial and recent connection with the work force. The program retained a needs test, and the definition of unemployment meant that the need had to be new and acute rather than chronic.

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[8] The Senate Committee explained (*ibid.*):

> Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family. These children will be benefited through the work relief program and still more through the revival of private industry. But there are large numbers of children in relief families which will not be benefited through work programs or the revival of industry.
>
> These are the children in families which have been deprived of a father's support and in which there is no other adult than one who is needed for the care of the children. These are principally families with female heads who are widowed, divorced, or deserted.

The legislative history shows that Congress intended Section 407 to eliminate a specific flaw in the basic AFDC program—that program's tendency to induce fathers who were unable adequately to support their families to desert their homes so that their families could become eligible for benefits. Because the presence of both parents in the home disqualified a family from the AFDC program, a father might significantly help alleviate his family's financial problems by deserting. Congress was presented with evidence that approximately one-fifth of the AFDC caseload involved cases of paternal desertion and that the AFDC program itself contributed to the break-up of families by encouraging unemployed fathers to leave home to enable their wives and children to receive AFDC benefits. There was no evidence, however, that any significant number of mothers deserted.

1. One of the Principal Purposes of the Legislative Precursor of Section 407 Was to Reduce the Incentive for Unemployed Fathers to Desert Their Families

a. The legislative precursor to Section 407 was the Act of May 8, 1961, Pub. L. No. 87-31, 75 Stat. 75 (hereinafter "the 1961 Act"), which extended AFDC benefits for the first time to children in families where both parents are present and able-bodied, but one or both is unemployed. The 1961 Act was a temporary measure enacted during a period of severe recession accompanied by the highest unemployment since World War II. H.R. Rep. No. 28, 87th Cong.,

1st Sess. 2 (1961) (hereinafter "*1961 House Report*").

As part of a broad program to relieve the hardship caused by the recession, the President proposed "that the Congress enact an interim amendment to the aid to dependent children program to include the children of the needy unemployed." 107 Cong. Rec. 1679 (1961). The President stated (*ibid.*):

> Under the aid to dependent children program, needy children are eligible for assistance if their fathers are deceased, disabled, or family deserters. In logic and humanity, a child should also be eligible for assistance if his father is a needy unemployed worker—for example, a person who has exhausted unemployment benefits and is not receiving adequate local assistance. Too many fathers, unable to support their families, have resorted to real or pretended desertion to qualify their children for help. Many other fathers are prevented by conscience and love of family from taking this route, thereby disqualifying their children under present law.

In response to the President's message, the House of Representatives conducted hearings on the proposal to extend the AFDC program. *Hearings on H.R. 3864 and 3865 Before the House Comm. on Ways and Means*, 87th Cong., 1st Sess. (1961) (hereinafter "*1961 Hearings*"). Abraham Ribicoff, then Secretary of Health, Education, and Welfare, urged that the legislation proposed by the Administration "would eliminate one of the major concerns that has been expressed through the years about the aid to dependent children program—namely, that unemployed fathers are forced to desert their families in order that their families may receive aid." *1961 Hearings, supra*, at 95. The Secretary presented evidence that in 65.4% of all families receiving benefits under the existing program of aid to dependent children both parents were alive, neither was incapacitated, but the father was absent from the home. *1961 Hearings, supra*, at 96-97. In 18% of all AFDC families the father had deserted the family. *Ibid.* Numerous witnesses testified that the AFDC program was inducing fathers who became unemployed to abandon their families in order to allow them to qualify for AFDC benefits. *1961 Hearings, supra*, at 222, 277-280, 328-334, 350, 352, 354, 420, 421.

There was no evidence before Congress that any significant number of mothers deserted their families in order to allow them to become eligible for benefits. Indeed, although Secretary Ribicoff did not provide a separate figure for families where the father was present and the mother had deserted, he presented evidence that in only 1.8% of AFDC families was the father present and the mother dead, incapacitated, or absent for any reason. *1961 Hearings, supra*, at 96-97.

b. The House Committee reported favorably on the proposed legislation. *1961 House Report, supra.* The Committee's statement of the "Need for the Legislation" quoted the full text of the President's statement calling for extension of the AFDC pro-

gram because " '[t]oo many fathers, unable to support their families, have resorted to real or pretended desertion to qualify their children for help.' " *Id.* at 2.

Although the President's statement had focused primarily on children of unemployed fathers, the bill reported by the House Committee,[9] and ultimately enacted, was drafted more broadly to include in the definition of "dependent child" a needy child "who has been deprived of parental support or care by reason of the unemployment (as defined by the State) of a parent * * *." *1961 House Report, supra,* at 10.

During the course of the debates some of the proponents of this bill supported it as a general extension of the AFDC program to "needy families where the need is occasioned by unemployment." 107 Cong. Rec. 3759 (1961) (remarks of Rep. Lane). For example, Representative Byrnes argued that "[i]t is very difficult, if not impossible, to distinguish as far as the plight of the needy child is concerned between the child in the family of, let us say, a disabled breadwinner who cannot work, and the needy child in a family where the breadwinner is unable to find work of any kind in order to support his family." 107 Cong. Rec. 3767 (1961).

Other proponents of the legislation in both the House and the Senate debates supported the bill on the narrower ground suggested by the President, advocating its passage to eliminate the incentive the

[9] H.R. 4884, 87th Cong., 1st Sess. (1961).

AFDC program then gave unemployed fathers to desert. For example, Representative Ryan commented that "this bill highlights a permanent problem in our aid-to-dependent-children program which allows payments to the family of the father who deserts his family but penalizes the father who, in the words of the President, is prevented by conscience and love of family from taking this route." 107 Cong. Rec. 3769 (1961). Representative Baldwin stated that "the biggest single problem which has been created by the aid-to-needy-children program as it exists today is that the actual wording of the present law stimulates the breaking up of homes." *Id.* at 3765. Referring to examples cited in the hearings, he added that "[t]here is no question that there are many other instances that have been verified where fathers who would like to stay and be proper fathers to their children, have found that because of unemployment conditions they cannot provide for those children. And they also found that the only way those children can obtain aid to needy children is for the father to desert his home and family." *Ibid.*

Similarly, during the brief Senate debates,[10] Senator McCarthy praised the bill as a measure that would reduce the pressure on unemployed fathers to desert, noting that the Special Senate Subcommittee on Unemployment Problems had heard testimony as early

[10] The Senate Committee on Finance had reported favorably on H.R. 4884, devoting most of the Committee Report to a discussion of amendments not relevant here. S. Rep. No. 165, 87th Cong., 2d Sess. (1961).

as 1959 "from community leaders about fathers deserting their families so that their wife and children would be eligible for ADC benefits." 107 Cong. Rec. 6401 (1961).

c. The following year Congress extended this temporary program, without relevant change, for an additional five years. Act of July 25, 1962, Pub. L. No. 87-543, 76 Stat. 193.[11]

2. When Congress Enacted Section 407 to Authorize the AFDC-UF Program on a Permanent Basis, It Expressly Limited the Program to the Children of Unemployed Fathers

a. Section 407 was enacted in its present form in 1967 when the AFDC-UF program was authorized on a permanent basis. In contrast to the previous temporary enactments, which had applied to any child deprived of parental support by reason of the unemployment "of a parent," [12] Section 407 authorizes benefits only for a child deprived of parental support or care by reason of the unemployment "of his father." 81 Stat. 882. Both committee reports stated that the AFDC-UF program "was originally conceived as one to provide aid for the children of unemployed fathers." H.R. Rep. No. 544, 90th

[11] The changes made by the 1962 legislation include the addition of provisions denying assistance if the unemployed parent refused without good cause to undergo retraining, and permitting the payment of benefits to both caretaker parents, rather than only the unemployed parent. 76 Stat. 190, 196. See H.R. Rep. No. 1414, 87th Cong., 2d Sess. 14-19 (1962).

[12] See 75 Stat. 75; 76 Stat. 193.

Cong., 1st Sess. 108 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 160 (1967) (hereinafter "*1967 Senate Report*"). Noting that some states had adopted plans under the temporary legislation that included "families in which the father is working [and] the mother is unemployed," Congress decided that the permanent legislation should apply "only to the children of unemployed fathers." *Ibid.*

Both the Senate Committee report and the debates demonstrate that Congress did not intend this permanent addition to the AFDC program to displace state programs for general assistance and unemployment relief, and that the principal purpose of Section 407 was the elimination of the structural incentive in the AFDC program that induced paternal desertion. The Senate report stated that "[t]he committee is concerned about the effect that the absence of a State program for unemployed fathers has on family stability. Where there is no such program there is an incentive for an unemployed father to desert his family in order to make them eligible for assistance." *1967 Senate Report, supra,* at 160.

The evidence presented during the Senate hearings on the 1967 legislation revealed that in 19% of the families currently receiving AFDC benefits the father had deserted. *Hearings on H.R. 12080 Before the Senate Comm. on Finance,* 90th Cong., 1st Sess. 254 (1967) (hereinafter "*1967 Hearings*").[13]

[13] This figure included both states that had only the AFDC program, and those that had adopted the AFDC-UF program as well. In both 1961 and 1967 the proportion of families

Throughout the debates on the omnibus social security amendments that included Section 407, legislators in both houses described Section 407 as a measure to correct the unintended incentive that the AFDC program had created for paternal desertion. During the debates in the House of Representatives, Representative Ryan explained (113 Cong. Rec. 23096 (1967)):

> The fact that, prior to the temporary legislation passed in 1961, the definition of a dependent child require[d] the "continued absence from the home—of the parent" [citation omitted] in effect, forced an unemployed father to "desert" his family if they were to receive payments under this program. The proposed change will eliminate this invidious requirement, and should strengthen family bonds.

In the Senate, debate focused on Section 407 and its function when Senator Harris proposed an amendment making the AFDC-UF program established in Section 407 mandatory for all states. 113 Cong. Rec. 33193 (1967).[14] Harris urged that "the welfare system, itself, in many States encourages the breakdown of families, because it requires that a father in a family, otherwise entitled to aid to families with dependent children, but who is unemployed, leave his

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where the father had deserted was less than the national average in those States that had an AFDC-UF program. See pages 30-32, *infra*.

[14] The amendment passed the Senate, 113 Cong. Rec. 33195 (1967), but it was deleted by the Conference Committee. See H.R. Rep. No. 1030, 90th Cong., 1st Sess. 58 (1967); 113 Cong. Rec. 36785 (1967) (Sen. Kennedy).

children and his home so that they may be able to receive assistance." *Ibid.* Senator Robert Kennedy supported the proposed amendment, arguing that for the past 30 years "[o]ne of the basic problems of the poor has been our welfare program," which "make[s] it a premium for the father to leave the house." 113 Cong. Rec. 33194 (1967). Cf. *id.* at 35641-35642 (remarks of Sen. Mondale), 35642 (remarks of Sen. Kennedy).

b. The other provisions of Section 407 underscore its limited function, which was not intended to provide general relief to the children of the unemployed. Section 407(b) established a uniform federal definition of the term "unemployment" that restricted the AFDC-UF plan to families where the father had a substantial recent work history. In contrast to the prior temporary enactment, which left the definition of unemployment to the states, Section 407(b)(1)(C)(i) limited benefits to families where the father had worked six or more quarters during the 13 quarters ending one year prior to his application for benefits,[15] or had been qualified for unemployment compensation within the year prior to his application. Section 407 also excluded from coverage children whose father was receiving unemployment compensation, was not currently registered with the state public employment office, or had refused without good cause a bona

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[15] Section 407(d) defined a "quarter of work" as a calendar quarter in which the father either received income of $50.00 or more or participated in an authorized community work and training program or work incentive program.

fide offer of employment or training. 42 U.S.C. 607 (b)(1)(B), 607(b)(2)(C).

Debate in both houses focused on the question whether these restrictions were consistent with the goal of discouraging paternal desertion. In the House of Representatives, Representative Ryan argued that the exclusion of fathers who did not have a sufficient recent work history or who were receiving state unemployment compensation would undermine this goal (113 Cong. Rec. 23096 (1967)):

> [T]he requirement that one must have six or more quarters of work will obviously force those, who are unable to find work, or who have exhausted any community work and training program, to leave their families if AFDC payments are to be received.
>
> * * * * *
>
> Because such a large number of unemployed men have not been in the labor force for a long time, this amendment would exclude those families most in need from assistance unless the father leaves the home. This is clearly inconsistent with the proclaimed goal of the committee—that of strengthening family bonds.
>
> * * * * *
>
> Section 203(a) of the bill which would add subsection (2)(D)(v) to section 407(a) of the act denies assistance to families where the father is in the home and receiving unemployment compensation. This would force a father to leave his family so it would qualify for AFDC payments. This is not only harsh, but it is obviously inconsistent with the proclaimed policy of the committee favoring family unification.
>
> * * * The father of a family living in a State paying relatively low unemployment compensation may find it to the benefit of his family were he to "desert" so as to make his children eligible for AFDC payments.

Although the Senate passed the House bill with committee amendments deleting the exclusion of unemployed fathers who had no recent work history or who were receiving unemployment compensation,[16] the conferees adopted the more restrictive House version of Section 407. H.R. Conf. Rep. No. 1030, 90th Cong., 1st Sess. 57 (1967). The "restrictive House provisions" were sharply criticized during the Senate debates on the conference committee report on the ground that they would induce fathers to desert (113 Cong. Rec. 36785 (1967) (remarks of Sen. Kennedy)):

> These provisions are pernicious. They mean that more fathers will have to leave home in order that their children can obtain aid. They mean more broken families. They mean more broken lives. They mean more children having to grow up without fathers. They mean more juvenile delinquency and additional generations of dependency and tragedy.

In sum, the legislative history reflects a congressional consensus that the function of Section 407 was to eliminate the incentive for unemployed fathers to desert. There was disagreement about how broad

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[16] See *1967 Senate Report, supra*, at 160.

a program Congress should authorize to meet this goal, but there was agreement that the problem at hand depended on the sex of the unemployed parent.

B. THE GENDER DISTINCTION IN SECTION 407 IS CONSTITUTIONAL

1. This Court Has Articulated a Variety of Standards in Gender Discrimination Cases

In *Craig* v. *Boren*, 429 U.S. 190, 197 (1976), the opinion of the Court identified an intermediate standard of review applicable to claims of gender discrimination, stating that "[t]o withstand constitutional challenge, * * * classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." [17] But as Mr. Justice Powell stated in his concurring opinion (429 U.S. at 210 n.*), "the Court has had difficulty in agreeing upon a standard of equal protection analysis" in cases of gender distinctions. The many opinions in *Craig* and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), discuss numerous approaches to the analysis of gender distinctions.

In *Craig* both Mr. Justice Powell and Mr. Justice Stevens filed opinions stating that the Court had not established a special method of scrutiny applicable to gender-based distinctions. Mr. Justice Powell stated that the traditional rational basis standard is still

[17] See also *Califano* v. *Webster*, 430 U.S. 313, 316-317 (1977); *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), slip op. 34-37 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

applicable, although it "takes on a sharper focus when we address a gender-based classification." 429 U.S. at 211 n.*. In *Craig* and *Goldfarb* Mr. Justice Stevens argued that the Equal Protection Clause "does not direct the courts to apply one standard of review in some cases and a different standard in other cases" (429 U.S. at 211-212) and that courts should assess gender classifications by ascertaining whether they "imply that [one sex is] inferior to [the other]" or "condemn a large class on the basis of the misconduct of an unrepresentative few" or "add to the burdens of an already disadvantaged discrete minority" (430 U.S. at 218). He also emphasized that a classification that is the result of an "actual, considered legislative choice" is quite different from one that is "merely the accidental by-product of a traditional way of thinking about females." *Id.* at 222-223 & n.9. The opinion of the Court in *Califano* v. *Webster*, 430 U.S. 313, 317, 320 (1977), can be read as adopting this view.

In *Goldfarb*, Mr. Justice Rehnquist, in an opinion joined by the Chief Justice and Justices Stewart and Blackmun, argued that the standard of review should vary according to the nature of the statute in question and, because of the special nature of comprehensive schemes of social insurance, that cases employing specially rigorous scrutiny should not be "uncritically carried over into the field of social insurance legislation" (430 U.S. at 225). He observed that because modern social insurance legislation typically is a conglomeration of additions to an originally skeletal program, it often lacks the coherence that

could be achieved in an omnibus statute enacted at a single time. *Ibid.* And, because social insurance affects large numbers of persons, Congress has a special and legitimate concern about "certainty in determination of entitlement and promptness in payment of benefits." *Ibid.* Consequently, Mr. Justice Rehnquist argued, when dealing with gender distinctions in social welfare legislation the Court should apply the approach of *Mathews* v. *Lucas*, 427 U.S. 495, 510 (1976), where it upheld a Social Security provision that treated illegitimate children differently than legitimate children, finding that " 'the statutory classifications challenged here are justified as reasonable empirical judgments that are consistent with [the legislative] design * * *' " (430 U.S. at 237). See also *Califano* v. *Webster*, *supra*, 430 U.S. at 321 (Burger, C.J., concurring).

These approaches are not easily reconciled. Perhaps the Court's cases, taken together, establish that no law may be based on sexual stereotypes or stigmatize a person because of sex: the Constitution requires that laws dealing with gender be rationally supported in fact as well as in theory. The legislature cannot justify gender-based distinctions by appeal to administrative concerns or by appeal to assumptions about social roles of the sexes. As one commentator has summarized the recent cases, the laws held to be unconstitutional "shared an important characteristic in terms of impact on behavior: All either prevented, or economically discouraged, departures from 'traditional' sex roles, freezing biology

into social destiny." L. Tribe, *American Constitutional Law* 1065 (1978) (footnote omitted). The Court has upheld laws where the legislative assumptions were borne out in fact (see *Califano* v. *Webster*, *supra*), or when the statutes, although making some use of gender, ultimately did not discriminate for or against either sex. See *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n.20 (1974). Cf. *Vorchheimer* v. *School District of Philadelphia*, 532 F.2d 880 (3d Cir. 1976) (en banc), aff'd by an equally divided court, 430 U.S. 703 (1977) (applying the "separate but equal" principle to high schools segregated by sex).

The Court need not essay a definitive answer to these problems in this case, however, and we therefore do not further address the precise nature of the appropriate constitutional test. As we now argue, Section 407 is constitutional, under any of the possible standards, because its results are not gender biased and because it is a considered legislative response to a serious problem.

2. Section 407 Is Constitutional Under Any of the Available Standards

Congress acted within constitutional bounds in enacting Section 407, because the statute's gender distinction responds to the problem the AFDC-UF program was intended to correct, and the resulting distribution of benefits does not discriminate in favor of or against either sex. The distinction was the result of an "actual, considered legislative choice,"

Califano v. *Goldfarb*, *supra*, 430 U.S. at 223 n.9 (Stevens, J., concurring), designed to correct the proven tendency of the AFDC program to encourage paternal desertion, rather than of congressional reliance on stereotypes. Since the resulting scheme distributes benefits equally to men and women, it does not "add to the burdens of an already disadvantaged discrete minority," *id.* at 218 (Stevens, J., concurring), or "result in the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975).

a. Congress may not justify the use of gender in statutes by invoking " 'archaic and overbroad' generalization[s]" such as the notion "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Weinberger* v. *Wiesenfeld*, *supra*, 420 U.S. at 643, quoting from *Schlesinger* v. *Ballard*, *supra*, 419 U.S. at 508. The district court concluded (J.S. App. 30A; footnote omitted) that in enacting the AFDC-UF program Congress acted on the overbroad assumption that fathers generally support their families, and that "mothers in two parent families are not breadwinners, so that loss of their earnings would not substantially affect the families' well-being."

As we have shown, the legislative history demonstrates that Congress did not limit the AFDC-UF program to families with unemployed fathers because

of the stereotyped view that mothers are not breadwinners. The legislative decision rested on evidence that limitation of AFDC benefits to one-parent families induced unemployed fathers to desert their families but did not induce unemployed mothers to desert. The evidence showed, moreover, that paternal desertion was a serious problem, and that a large portion of the AFDC caseload consisted of families where the father had deserted. *1961 Hearings*, *supra*, at 96-97; *1967 Hearings*, *supra*, at 254. Many witnesses testified that the AFDC program had the unintended effect of encouraging desertion by unemployed fathers, because once the father left home, the remaining family members would qualify for AFDC benefits. *1961 Hearings*, *supra*, at 222, 277-280, 328-334, 350, 352, 354, 358, 420, 421. There was no evidence that a significant number of mothers had deserted their families.[18]

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[18] The district court concluded (J.S. App. 27A) that Congress' primary purpose was the broader goal of "providing financial assistance to families with needy children who are without the support of a breadwinner, and in particular, to those families where the breadwinner becomes unemployed and is unable to provide for their economic well being." As we have shown at pages 13-18, *supra*, when Congress enacted the 1961 temporary law that preceded Section 407 many legislators supported a broadening of the AFDC program. But when Section 407 was adopted in 1967 to authorize the AFDC-UF program on a permanent basis Congress elected not to alter the basic focus of the AFDC program on the special problems of needy children in families where one parent is absent, dead or incapacitated, and it intended the AFDC-UF program to meet the narrow goal of reducing the incentive for parental desertion. The district court's reading of the legislative purpose neglects the difference between the 1961 Act and the 1967 Act.

The evidence available today—from the experience of states with the AFDC-UF program and from research by social scientists—confirms the evidence that was presented to Congress. The rate of paternal desertion decreased in the states that adopted AFDC-UF programs. In 1961, 12 states adopted AFDC-UF programs under the temporary legislation. In 1958 the paternal desertion rate among AFDC families in those states was 21.41%—well above the national average of 18%.[19] By December of 1961, after the adoption of AFDC-UF programs, the rate of paternal desertion among AFDC families in those 12 states fell to 16.78%, while the average desertion rate of paternal desertion for all AFDC families rose to 18.6%.[20] In 10 of those 12 states the desertion rate

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[19] Division of Program Statistics and Analysis, Bureau of Public Assistance, Social Security Administration, United States Department of Health, Education, and Welfare, Characteristics of Families Receiving Aid to Dependent Children, U.S. Totals, October-December 1958 (Selected State and National Tabulations) Table 3 (October 14, 1959). The 12 states that had adopted AFDC-UF programs by December 1961 are Connecticut, Delaware, Hawaii, Illinois, Maryland, New York, Oklahoma, Pennsylvania, Rhode Island, Utah, Washington, and West Virginia. See note 20, *infra*. The average percentage of desertion for those states was computed by determining the number of families in which the father had deserted in each state from the percentages given for each state, and comparing this number to the total number of AFDC families in those 12 states.

[20] Division of Program Statistics and Analysis, Bureau of Family Services, Welfare Administration, United States Department of Health, Education, and Welfare, Characteristics of Families Receiving Aid to Families With Dependent Children, November-December 1961, Table 12 (April 1963). The chart indicates that complete data was not available for Massachusetts, Oregon and Guam. In addition to the 12 states listed in note 19, *supra*, North Carolina had an AFDC-UF program, but less than .05% of its AFDC families participated. *Id.* at n.3. We have not included North Carolina in our calculations.

fell to below the national average.[21] In other words, at the same time as the national desertion rate was rising, the rate in AFDC-UF states declined by approximately one-fourth. By December 1967, when 21 states had adopted AFDC-UF programs, the nationwide rate of paternal desertion among AFDC families was 18.1%.[22] The paternal desertion rate of 16 of the 21 states participating in the AFDC-UF program was below the national average, and the average rate of paternal desertion among AFDC families in the 21 states, 16.92%, was also below the national average.[23] The average desertion rate in states without AFDC-UF was 20.37%.[24]

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[21] *Ibid.*

[22] National Center for Social Statistics, Social and Rehabilitation Service, United States Department of Health, Education, and Welfare, Findings of the 1967 AFDC Study: Data By State and Census Division, Part I, Table 22 (July, 1970). The 21 states with AFDC-UF programs were: Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Ohio, Illinois, Michigan, Wisconsin, Nebraska, Kansas, Delaware, Maryland, West Virginia, Oklahoma, Colorado, Utah, Washington, Oregon, California, and Hawaii. *Ibid.*

[23] *Ibid.* The average for these states was computed by the procedure used in note 19, *supra*, page 30.

[24] No comparable data is available after 1967, because HEW compiled and published complete data only for selected states.

There is also a body of social science research supporting the proposition that paternal unemployment is a major cause of desertion and family dissolution. See, *e.g.*, Aldous, *Wives' Employment Status and Lower-Class Men as Husband-Fathers: Support for the Moynihan Thesis*, 31 J. Marriage & Family 469 (1969); Aldous, *Occupational Characteristics and Males' Role Performance in the Family*, 31 J. Marriage & Family 707 (1969); Hauser, *Demographic Factors in the Integration of the Negro*, 94 Daedalus 847, 867 (1965); Moynihan, *Employment, Income, and the Ordeal of the Negro Family*, 94 Daedalus 745, 761-769 (1965); Rainwater, *Crucible of Identity: The Negro Lower-Class Family*, 95 Daedalus 209 (1965).[25] More recent, and more sophisticated, studies show that restriction of AFDC to one-parent families and an increase in payments at a rate faster than increases in average wages strongly contributes to dissolution. See Honig, *AFDC Income, Recipient Rates, and Family Dissolution*, 9 J. Human Resources

[25] Much of the scholarly interest was stimulated by a widely circulated 1965 Department of Labor Study—popularly called the Moynihan Report—that documented the close parallels between the unemployment rate among nonwhite males, on the one hand, and both the percentage of nonwhite married women who were separated from their husbands and the number of new AFDC cases opened, on the other hand. Office of Policy Planning and Research, United States Department of Labor, *The Negro Family: The Case for National Action* 13, 21-22, 67-68, 78 (1965). This study also had a significant effect on federal policy. See generally L. Rainwater and W. Yancy, *The Moynihan Report and the Politics of Controversy* (1967).

303 (1974); Ehrenberg & Hewlett, *The Impact of the WIN 2 Program on Welfare Costs and Recipient Rates*, 11 J. Human Resources 219 (1976); Minarik & Goldfarb, *AFDC Income, Recipient Rates and Family Dissolution: A Comment*, 11 J. Human Resources 243 (1976).

In sum, Section 407 addresses a serious flaw in the basic AFDC program. The impetus for the enactment of Section 407 was not an unsupported belief, based on sexual stereotypes, that fathers were more likely than mothers to be breadwinners or to desert their families if they became unemployed. Solid statistical evidence, not stereotypes, supplied the basis for Section 407. There was substantial debate on the question whether the bill should be broadened to apply to other circumstances where the father might have an incentive to desert—such as the situation where he receives unemployment benefits that are too low to provide adequate support for his family. In keeping with the goal of restricting welfare expenditures, Congress enacted the more restrictive House version of the bill, which extended AFDC benefits only to one class of fathers that might be especially subject to the pressure to desert—those who had had a recent and substantial connection with the workforce, or who had received unemployment compensation until recently, and were suddenly unable to support their families.

Congress might have extended AFDC benefits to all needy children whose parents were unemployed, or to all needy children regardless whether their

parents were present or absent, working or unemployed.[26] But it chose instead to retain the limited function of the AFDC program, and to authorize states to add the AFDC-UF program only as an adjunct to discourage paternal desertion. As the district court acknowledged (J.S. App. 27A-28A), this is an important government objective. In attaining that objective, Congress was not obliged at the same time to enact a general remedy for unemployment or to fashion a statutory scheme that would encourage unemployed mothers to remain in the home when it had no reason to believe that such encouragement was needed. "Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by * * * [limiting AFDC benefits to one-parent families] without accomplishing its entire objective in the same piece of legislation. * * * Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like [appellees]." *Califano* v. *Jobst*, 434 U.S. 47, 57-58 (1977).

These principles do not lose their force simply because, as the Court reasoned in *Craig* and *Webster*, gender-based classifications must have a "substantial" relationship to an "important" objective. The importance of preventing paternal desertion is ac-

[26] In fact, on three occasions Congress has decided not to enact bills that would have expanded the AFDC program to the children of the working poor. See H.R. 16311, 91st Cong., 2d Sess. (1970); S. 1960, 91st Cong., 1st Sess. (1969); S. 2893, 90th Cong., 2d Sess. (1968).

knowledged (J.S. App. 27A); family life is a basic part of our cultural heritage, and governmental action should not cause its dissolution. *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion). And the substantiality of the relationship is established by the statistical evidence we have discussed above. A relationship can be substantial even if not perfect. As Mr. Justice Powell explained in *Lalli* v. *Lalli*, No. 77-1115 (Dec. 11, 1978), even in a case involving classifications based on illegitimacy, which "are invalid * * * if they are not substantially related to permissible state interests" (plurality slip op. 5), the proper "inquiry * * * does not focus on the abstract 'fairness' of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment" (*id.* at 13). The Court held in *Lalli* that a statute bore a "substantial" relationship to the state's interest where it established an evidentiary rule that served useful purposes and did not "inevitably disqualif[y] an unnecessarily large number of children born out of wedlock" (*ibid.*). The relationship between Section 407 and its objective is much more substantial than the relationship between the statute in *Lalli* and its objective.[27] Moreover, Section 407

[27] It is thus irrelevant that Section 407 still leaves unemployed fathers with an incentive to desert when both parents are unemployed but the father does not have enough work experience to qualify as "unemployed." That simply shows that Congress did not go as far as it could have gone in eliminating the AFDC program's perverse incentives. It does not

"disqualifies" no one for general assistance, ordinary unemployment benefits, and the like. It was an expanding amendment; as in *Jobst* it "had no adverse impact on persons like [appellees]." 434 U.S. at 58.

b. Perhap the arguments we have made above would be insufficient to sustain Section 407 if that statute achieved its objectives—however well it did so and however important they are—at the needless expense of women. But the statute does not sacrifice the interests of one sex to those of the other. Indeed, it does not discriminate at all, whether assessed by value of benefits paid or by value of "contributions."

Section 407 unquestionably draws a distinction on the basis of gender: a family in which the father is unemployed is eligible for benefits if it satisfies applicable need tests, but a family in which the mother is unemployed is not eligible, even though its need may be as great as that of the first family. But even though Section 407 draws a distinction between families on the basis of the gender of the parent that is unemployed, the result of applying the statute is not gender-biased. The benefits of the AFDC-UF program are distributed equally to men and women. The AFDC-UF program assists only two-parent families. Section 407 provides for a grant of aid, on the basis of the father's unemployment, that benefits the entire family—a father, a mother,

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show that the program it devised in 1967—which eliminates the incentive to desert in an overwhelming proportion of the cases—is not "substantially" related to the important objective of eliminating that incentive.

and one or more children. The grant or denial of aid affects—to an equal degree—one man, one woman, and children of either sex or both sexes.

In contrast, each of the gender-based provisions invalidated by this Court also produced a gender-biased result. In *Reed* v. *Reed*, 404 U.S. 71 (1971), a state statute required that males be preferred over females who were equally qualified to administer an estate. In *Stanton* v. *Stanton*, 421 U.S. 7 (1975), and *Craig* v. *Boren*, *supra*, state statutes establishing a higher age of majority for males and allowing females to purchase beer at a younger age were held to violate the Equal Protection Clause. Finally, a trio of cases, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), *Weinberger* v. *Wiesenfeld*, *supra*, and *Califano* v. *Goldfarb*, *supra*, involved gender distinctions superficially similar to Section 407, in that each allocated benefits on the basis of the beneficiary's familial relationship to a federal employee or a wage earner covered by social security. But in each of those cases the vice of the statutory provision was not simply that it drew a distinction on the basis of gender, but rather that the gender distinction produced an unequal division of benefits between men and women that did not serve any substantial governmental interest.

Frontiero, *Wiesenfeld*, and *Goldfarb* each involved a claim that a female employee was receiving less compensation than a male employee or that her family received less favorable benefits than the families of male wage earners who paid the same amount of

social security taxes. The result of applying the statutory gender distinction in each of those cases was gender-biased. The effect of the statute challenged in *Frontiero* was to deny servicewomen the same compensatory fringe benefits for their spouses that servicemen received. As a result, "females with nondependent husbands were effectively denied equal compensation for equal efforts." *Goldfarb, supra*, 430 U.S. at 241 (Rehnquist, J., dissenting). In *Wiesenfeld* and *Goldfarb* "female workers [were] required to pay social security taxes producing less protection for their families than [was] produced by the efforts of men." *Wiesenfeld, supra*, 420 U.S. at 645; see *Goldfarb, supra*, 430 U.S. at 206-207.

The rationale of these cases, as Mr. Justice Brennan concluded for a plurality of the Court in *Goldfarb*, is that "benefits 'directly related to years worked and amount earned by a covered employee, and not to the need of the beneficiaries directly,' like the employment-related benefits in *Frontiero*, 'must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex.'" 430 U.S. at 212, quoting from *Wiesenfeld, supra*, 420 U.S. at 647. *Frontiero*, *Wiesenfeld*, and *Goldfarb* thus hold that benefits distributed as compensation for work, or in relation to the contributions of covered employees, may not be distributed on an unequal basis to men and women unless the inequality is justified by sufficient governmental interests.

Section 407 does not violate the principle established in those cases because the gender distinction does not result in any unequal distribution of benefits to men and women.[28] More than that, Section 407 does not give unequal weight to contributions. The AFDC program—unlike the compensatory or contributory programs in *Frontiero*, *Wiesenfeld*, and *Goldfarb*—is a non-contributory welfare program for the aid of dependent children. The AFDC program also permits the payment of benefits to caretaker relatives[29] and one or (under AFDC-UF) both parents. But AFDC benefits are in no sense either payment for either parent's past employment or intended as unemployment compensation. AFDC benefits are not based on the taxes or contributions paid by either parent. Except in a very loose way, they are not based on length of prior employment. Accordingly, although the benefits are not available to a family when the mother (but not the father) is unemployed,

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[28] To the extent there is any sex-biased effect, the AFDC program as a whole favors women. In 1975 (the most recent year for which HEW has published statistics), a natural or adoptive mother was present in 91.1% of all AFDC families, and more than 90% of those mothers received a portion of the AFDC grant. In contrast, in the same year a natural or adoptive father, or a legally responsible stepfather, was present in only 10% of AFDC families, and only 73% of those fathers received part of the AFDC grant. Office of Research and Statistics, Social Security Administration, United States Department of Health, Education, and Welfare, *Aid to Families With Dependent Children in 1975 Recipient Characteristics Study*, Pt. 1, 3-4 (1977).

[29] See 42 U.S.C. 606(b).

Section 407 does not deny female employees the same compensation paid to male employees or diminish the value of taxes previously paid by mothers. In sum, the AFDC-UF program does not denigrate "the efforts of women who do work and whose earnings contribute significantly to their families' support." *Wiesenfeld, supra,* 420 U.S. at 645.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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FEBRUARY 1979

APPENDIX

Section 407 of the Social Security Act, 75 Stat. 75, as amended, 42 U.S.C. 607, provides:

> (a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.
>
> (b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title.
>
> > (1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—
> >
> > > (A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,
> > >
> > > (B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d) (1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d) (3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application of such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be certified to the Secretary of Labor as provided in section 602(a)(19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b)(1) of this section, or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b)(2) of this section), under the program therein specified, to certify such father to the Secretary of Labor pursuant to section 602(a)(19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar

quarter in which such individual received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 413(a)(2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any other work and training program subject to the limitations in section 609 of this title, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

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